No. 89-6985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF A PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner submits this reply pursuant to Rule 15.6 to the government's brief in opposition to the petition for a writ of certiorari.

Petitioner argued to the court of appeals below that he had established a prima facie case of discrimination under the rule of Batson v. Kentucky, 476 U.S. 79 (1986), and that the

government failed to rebut the inference of discrimination. The government argued that there was no prima facie case and that it had race-neutral explanations for each exclusion. These competing claims were not resolved, however, by the court of appeals, which ruled that no appellate inquiry was required into the merits of a Batson claim if the final composition of the jury mirrored the demographic makeup of the district of trial. The government concedes here that the analysis of the court of appeals below was incorrect but urges this Court to deny the petition because there were other grounds on which the court of appeals could have affirmed the district court judgment and the decision of the court of appeals is unlikely to have great impact. The government ignores, however, the significant change in the law wrought by the opinion below. It has presented, at best, an argument for summary reversal (Rule 16.1) and a remand for reconsideration of the arguments originally presented by the parties.

1. The Court of Appeals Failed to Resolve the Substantial Issue Whether the Government Adequately Justified Its Strikes

The government repeats its arguments to the court of appeals below that using four of its seven peremptory challenges to exclude minority group members did not establish a pattern, that Juror Garcia was excluded because he was not fluent in English, Juror Callier because she had children the same age of the defendant, Juror Brown because she was a social worker and Juror Clark because he was too young and inexperienced to be a foreperson. The government leaves out those facts

demonstrating that these justifications were pretextual: The record shows that Juror Garcia answered all questions put to him in perfectly fluent English, and the government's only complaint about him on appeal was that he spoke with a "heavy accent." Three white jurors had children similar in age to the defendant's, but only a black juror was excluded. Nor did the government exclude Frank Neimeroff, a paraprofessional guidance counselor, balking only at Mrs. Brown, a black social worker. Finally, the trial judge instructed the jury to select a foreperson itself and nothing prevented the government from making such a request before trial rather than excluding a black man based on the assumption that he must necessarily be the foreperson. Petitioner agrees that these issues should be dispositive of this case. They should be resolved by the court of appeals on remand.

2. The Court of Appeals Has Already Refused to Reconsider its Ruling in Light of Holland v. Illinois

The government suggests that the court of appeals may not accord much precedential weight to the opinion below because it was based on princ ples discredited by this Court in Holland v. Illinois, 110 S. Ct. 803 (1990). But Holland was decided before the court below had denied petitioner's application for rehearing with a suggestion for rehearing en banc. Petitioner's counsel notified the court below of Holland immediately after it was decided and argued, in a letter to the Court pursuant to Fed. R. App. P. 28(j), for reconsideration in its light. The court then denied rehearing. There is

therefore no indication that the court below considers Holland dispositive of the issue whether the final composition of the jury defeats a Batson claim without regard to the pattern of strikes or the quality of the government's explanations.

3. The Issue Presented is Important

The government finally suggests that the issue presented is unimportant because few cases will be affected by what the government agrees was the erroneous analysis below. The government suggests that the final composition of the jury is important to "conventional Batson analysis" so that few cases will be resolved differently under the two standards. But under conventional Batson analysis, even one discriminatory strike is unconstitutional. The final composition of the jury may be invoked as proof that there was no discriminatory intent, but reversal is mandated if discriminatory intent is proven by other evidence. United States v. Clemmons, 843 F.2d 741, 747 (3d Cir. 1988), cert. denied, 109 S. Ct. 97 (1988); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). Under the erroneous analysis below, in contrast, the final composition of the jury defeats a Batson claim no matter what, without regard to the strength of any other evidence of discrimination.

The government finally argues that this case is unimportant because district judges still have the obligation to rule on Batson claims "on the spot" and review of their decisions is so deferential that reversal is rarely required.

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CERTIFICATE OF SERVICE

Counsel hereby certifies that three copies of petitioner's reply in support of a petition for a writ of certiorari have been served by express mail on the Solicitor General of the United States, and that one copy has been similarly served on the United States Department of Justice, Criminal Division.

Dated: New York, New York
May 24, 1990

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